

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

PETER KEVIN WILLIAMS,

Appellant.

No. 38002-1-II

UNPUBLISHED OPINION

Armstrong, J. — Peter Kevin Williams appeals his conviction of possession of methamphetamine, contending that an unlawful search incident to arrest led to the discovery of the drugs. We reverse and remand to the trial court for a hearing as to whether grounds other than the arrest support the search of Williams’s motorcycle. If the State cannot show other grounds, the trial court must suppress the methamphetamine seized from the motorcycle.

Facts

Kitsap County Deputy Sheriff Daniel Twomey passed Williams’s motorcycle while on patrol. After Twomey ran Williams’s license plate and discovered that his license was suspended, he pulled Williams over.

Twomey noticed that Williams’s speech was slurred and that he smelled of intoxicants. He asked Williams to remain by the patrol car while he called for assistance. While he was making that call, Twomey saw Williams return to his motorcycle and manipulate a saddlebag.

Twomey determined that no assistance was available and asked Williams to perform field sobriety tests. Based on his earlier observations as well as Williams’s performance of the field tests, Twomey arrested Williams for driving under the influence and placed him in the back of the

patrol car.

Twomey then searched the motorcycle. He started with the saddlebag Williams had manipulated and retrieved a clear baggie containing methamphetamine. Twomey also found a half-empty bottle of wine in the motorcycle's rear trunk. Williams denied knowing anything about the baggie and accused Twomey of planting it. He refused to give a breath sample after Twomey took him to jail.

The State charged Williams with possession of methamphetamine, driving under the influence of alcohol and/or drugs, with the special allegation that he refused to take a breath test, and driving with a suspended license in the third degree. Williams moved to suppress statements he made before and after his arrest but did not move to suppress any of the evidence discovered in his motorcycle or otherwise challenge its search.

Williams pleaded guilty to driving with a suspended license and the jury found him guilty of possession of methamphetamine and driving under the influence, with the special allegation that he refused to submit to a breath test. The trial court imposed concurrent standard range sentences.

Analysis

I. Search Incident to Arrest

Williams challenges the search of his motorcycle under article I, section 7 of the state constitution. While his appeal was pending, the United States Supreme Court reevaluated the search incident to arrest exception under the Fourth Amendment. *Arizona v. Gant*, ___ U.S. ___, 129 S. Ct. 1710, 173 L. Ed. 2d 485, 77 U.S.L.W. 4285 (2009). *Gant* rejected the reading of *New*

York v. Belton, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981), that predominated in the lower courts, namely, that the Fourth Amendment “allow[s] a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search.” *Gant*, 129 S. Ct. at 1718. The court held instead that “[p]olice may search a vehicle incident to a recent occupant’s arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest.” *Gant*, 129 S. Ct. at 1723.

The decision in *Gant* prompted the Washington Supreme Court to reconsider the search incident to arrest exception under article I, section 7 of our state constitution. *State v. Valdez*, 167 Wn.2d 761, ___ P.3d ___, 2009 WL 4985242 (Wash. Dec. 24, 2009), at *2; *State v. Patton*, 167 Wn.2d 379, 394, 219 P.3d 651 (2009). The court held that article I, section 7 permits a warrantless search of an automobile under the search incident to arrest exception only when that search is necessary to preserve officer safety or prevent destruction or concealment of evidence of the crime of arrest. *Valdez*, 2009 WL 4985242, at *8; *Patton*, 167 Wn.2d at 384.

The State does not dispute that these cases apply to Williams’s appeal. *See State v. Harris*, No. 36565-1, 2010 WL 45755 (Wash. Ct. App. Jan. 7, 2010), at *2; *State v. McCormick*, 152 Wn. App. 536, 216 P.3d 475, 476 (2009) (new constitutional rule for conduct of criminal prosecutions applies retroactively to cases pending on direct appeal). Nor does the State argue that the search of Williams’s motorcycle was necessary to preserve officer safety or prevent concealment or destruction of evidence at the time of arrest. Rather, the State contends that

Williams has waived the ability to obtain relief from the cases discussed above because he did not move to suppress the evidence seized from his motorcycle or otherwise challenge its search. The State also contends that if Williams's challenge is not waived, the search is excused under the good faith exception to the warrant requirement.

The failure to move to suppress under pre-*Gant* law does not waive the defendant's right to take advantage of *Gant* and its progeny on appeal. *Harris*, 2010 WL 45755, *6; *McCormick*, 216 P.3d at 476-77. An appellant may raise for the first time on appeal a claim of manifest error affecting a constitutional right. *Harris*, 2010 WL 45755, at *3 (citing RAP 2.5(a)(3)). The warrantless search of Williams's motorcycle presents an issue of manifest constitutional error prompted by a change in the law, and we decline to hold that Williams waived the right to challenge that search under *Patton* and *Valdez* by failing to bring a meritless motion to suppress before trial.

We also hold that the good faith exception does not apply to excuse the warrantless search of Williams's motorcycle. As both *Harris* and *McCormick* noted, article I, section 7 does not recognize a good faith exception to the warrant requirement. *Harris*, 2010 WL 45755, at *6; *McCormick*, 216 P.3d at 478. We disagree with Division One's holding to the contrary in *State v. Riley*, No. 62418-1, 2010 WL 427118 (Wash. Ct. App. Feb. 8, 2010).

The search of Williams's motorcycle clearly exceeded the bounds of a lawful search incident to arrest under article I, section 7. Because the State did not have the chance to argue below that other grounds might validate the motorcycle's search, however, we reverse and remand to the trial court so that the State may raise such grounds. If the State cannot show other

No. 38002-1-II

grounds, the trial court must suppress the methamphetamine seized from the motorcycle.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Bridgewater, J.

Penoyar, A.C.J.